INTHE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

C.R. No. 1630 of 1997
Date of decision November 28, 2007

Parveen Kumar s/o Rajinder Pal r/o N.F.4, Qilla Mohalla, Jalandhar City.

..... Petitioner

Versus

1. **Sanjay Kapoor s/o Sh. Vinod Kapoor, r/o N.F.4, Qilla Mohalla, Jalandhar City.**
2. **Smt. Kamla wd/of Rajinder Pal**
3. **Deepak s/o Sh. Rajindere Pal**
4. **Mrs. Gulshan d/o Rajinder Pal**
5. **Mrs Malti d/o Rajinder Pal**
6. **Mrs. Mamta d/o Rajinder Pal**
   all residents of N.F.4 Qilla Mohalla, Jalandhar City.
7. **Ranvir Kumar s/o Sh. Bikram Pal r/o NF.4 Qilla Mohalla, Jalandhar City.**
8. **Mrs. Raj w/o Sh. Ram Chand Dewan, r/o N.F.4 Qilla Mohalla, Jalandhar City.**
9. **Miss Vijay Kumari d/o Sh. Moti Ram**
10. **Mrs. Santosh w/o Ram d/o Moti Ram**
11. **Dharam Dutt @ Kukku s/o Moti Ram**
12. **Yogesh Chander @ Pappu s/o Moti Ram**
13. **Smt. Kamla d/o Gian Chand.**
14. **Deep Chand s/o Hari Chand.**
    All residents of N.F.4 Qilla Mohalla, Jalandhar City.
15. **Sh. Sita Ram s/o Sh. Bagga Ram r/o NF-4 Qilla Mohalla, Jalandhar City.**
16. **Sheela Rani w/o Sita Ram, NF-4 Qilla Mohalla, Jalandhar City.**

..... Respondents

CORAM: HON'BLE MR. JUSTICE SHAM SUNDER

Present: Mr. J.K. Sibal, Senior Advocate with
Mr. Sapan Dhir, Advocate for the petitioners.

Mr. Anish Setia, Advocate
for the respondents.

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Sham Sunder, J.

This judgment is directed against the order dated 22.3.1997 rendered by the Court of Civil Judge, (Jr. Division), Jalandhar vide which it

dismissed the application under Section 65 of the Evidence Act, filed by the defendants, for leading secondary evidence, in respect of the Will dated 16.11.1924.

2. The facts, in brief, are that Sanjay Kapoor, plaintiff-respondent filed a Civil Suit for possession of 1/12th share, in the property, fully detailed in the plaint, which was fixed for 19.7.1997, for evidence of defendants No. 2 and 3. The case of defendants No. 2 and 3 was that the Will dated 16.11.1924, was executed, by Labhu Ram, brother of the late father of the revision-petitioner, vide which he had bequeathed his own property to Vikram Pal-adopted son. It was further the case of the revision petitioner that the property had been inherited by three brothers, namely Bihari Lal, Madho and Labhu, sons of Nathu, the great grand father of the applicant. After the property was inherited, by the three sons, referred to above, they partitioned the same orally. After the partition, the house tax was levied separately and the successors-in-interest of Bihari Lal, Madho and Labhu inherited the property. The Will executed, was in possession of Vikram Pal-adopted son. Since he had died long ago, a notice was given to plaintiff and defendant No.7, for producing the same, but they did not produce it. It was further stated that the Will was entered in the deed writer register of Bihari Lal. He had also died. His grand son was also a Deed Writer, at one time, and was working along with his grand father. He was, in a position to identify, his signatures and hand writing. The register of the Deed Writer is not available. A copy of the entry of the register, mentioning the fact of execution of Will and partition was obtained on 22.5.1941, by Ram Pal, the brother of Vikram Pal, the latter having been adopted by Labhu Ram. It was further stated that the revision-petitioner summoned

Vijay Kumar to appear, as their witness to prove the copy of entry of the register of the Deed Writer referred to hereinbefore. However, the Civil Judge vide order dated 12.2.1997 refused to record his evidence, on the ground, that permission to lead secondary evidence had not been obtained from the Court. Thereafter, in pursuance of the said order, the applicant applied for leading secondary evidence of the Will dated 16.11.1924, but the same was dismissed. It was further stated that, if the execution of the Will, was not proved, then the case of the plaintiff , would fail.

3. The respondents, in their reply, denied the factum of execution of Will dated 16.11.1924 by Labhu Ram. They also denied the factum of partition.

4. The trial Court, after hearing the learned Counsel for the parties, and on going through the evidence, on record, dismissed the application, vide order dated 22.3.1997.

5. Feeling aggrieved, against the order dated 22.3.1997, the instant revision-petition was filed by the petitioner. Notice of the same, was given to the respondents, who put in appearance, and contested the same.

6. I have heard the learned Counsel for the parties, and have gone through the record of the case, carefully.

7. The defendant-revision petitioner, could be allowed to lead secondary evidence, in respect of the un-registered Will dated 16.11.1924 only, after he had established the existence and loss of the same, through some believable evidence. Parveen Kumar–petitioner, when appeared, as PW-4, had stated that copy of the entry of the register, in the hand of Bihari Lal deed writer, had been obtained by Madho Ram, during his life time, whereas, in the additional grounds of the revision petition, it was

stated by him that the copy was obtained on 22.5.1941, by Ram Pal, the brother of Vikram Pal, latter having been adopted by Labhu Ram. The evidence of Parveen Kumar-petitioner, PW-4, with regard to obtaining a copy of the entry of Will dated 16.11.1924, by Madho Ram, during his life time, is thus contradicted by the additional ground No.5 of the revision petition, wherein it was categorically stated that it was Ram Pal brother of Vikram Pal, who obtained the said copy. Vijay Kumar claiming himself to be a grand son of Bihari Lal, who allegedly scribed the Will dated 16.11.1924, and made an entry thereof, in his Deed Writer register, while appearing as, DW-3, stated that the deed writer register of his grand father Bihari Lal was destroyed, in the year 1984, as the same was moth eaten. He did not even state a single word that copy of the entry was obtained from Bihari Lal, his grandfather, by Madho Ram or Vikram Pal. In case, the register had been moth eaten and stood destroyed, the question of obtaining the copy of the entry, therefrom, did not at all arise. Even otherwise, Vijay Kumar, as on 3.2.1997, while appearing as, DW-3, gave his age as 52 years. The Will was allegedly scribed on 16.11.1924 i.e. 73 years before 3.2.1997. It means that Vijay Kumar was born somewhere, in the year 1945. Vijay Kumar, DW-3, in his examination-in-chief, stated that Bihari Lal his grand-father, died in the year 1952. It means that, at the time of death of Bihari Lal, Vijay Kumar was only seven years old. Under these circumstances, the question of recognizing the alleged signatures, and the alleged hand writing of Bihari Lal, on the photocopy of the entry, in the deed writer register by him, did not at all arise. It cannot be imagined that a child of seven years, just studying in the first or second class, would be

able to recognize the hand writing and the signatures of his grand-father as he could not be said to have been seeing him sign and write. There is nothing, on record, that he read urdu in any class or later on. In these circumstances, the Lower Court, was right in coming to the conclusion, that since the existence and loss of the Will dated 16.11.1924, had not been proved, by the revision-petitioner, he could not be permitted to lead secondary evidence. Since, the case was fixed for the evidence of the defendant/revision petitioner and other defendants, the Lower Court, also held that it was for the applicant to prove the existence and loss of such Will, and, as such, the application was pre-mature. The Lower Court, thus, gave liberty to the defendant/revision petitioner to lead further evidence, to prove the existence and loss of the Will dated 16.11.1924, so as to enable him, to persuade the Court, to grant permission to lead secondary evidence, in respect thereof. In these circumstances, the order dated 22.3.1997, passed by the Civil Judge (Jr.Division), Jalandhar, does not suffer from any illegality, and infirmity. The same deserves to be upheld.

8. In view of the above discussion, the revision petition is dismissed. The revision-petitioner shall however, be at liberty to lead further evidence to prove the existence and loss of the Will dated 16.11.1924, and thereafter his plea for seeking permission to lead secondary evidence shall be again decided by the Lower Court, as his application was dismissed being pre-mature by it. Any observation, made by this Court, in the order, shall not be taken as an expression of mind on merits of the case, or on merits of the plea if again, raised by the petitioner, for seeking permission to lead secondary evidence, in respect of the Will dated

16.11.1924, after producing further evidence. The parties are directed to appear in the Lower Court on 14.1.2008.

(SHAM SUNDER)
JUDGE

November 28, 2007
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